IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 638 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE R.R.TRIPATHI

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

BHAVARLAL TRILOKCHAND MARVADI

Appearance:
Mr. K.G. Sheth, APP, for appellant
MR BS SUPEHIA for Respondent No. 1, 2

CORAM : MR.JUSTICE M.H.KADRI and
MR.JUSTICE R.R.TRIPATHI

Date of decision: 17/12/1999

ORAL JUDGEMENT (per: Kadri, J.)

1. By means of filing this appeal under Section 378 of the Code of Criminal Procedure, 1973, the State of Gujarat has questioned correctness and legality of the judgment and order dated May 25, 1992, rendered by the learned Additional Sessions Judge, Mehsana, in Sessions

Case No.31 of 1992, acquitting the respondents of the offences punishable under Sections 29(B)(I) and 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 ('NDPS Act' for short).

2. It is the case of the prosecution that on May 10, 1991, Police Sub-Inspector, P.S. Nathani, accompanied by Police Inspector, V.M. Rajput, Police Constables, Pankajkumar Vishnuprasad and Narendrasinh Rajendrasinh, of Patan City Police Station, came to S.T. Bus-stand, Patan, and they had checked all the platforms of S.T. Bus-stand. At platform No.2, one person was found sitting on a bench, who was having a rexin bag which was held on his lap. The patrolling party suspected that the person was having some contraband articles in the bag. The person was interrogated and he disclosed his name as Bhavarlal Trilokchand Marwadi (respondent No.1). The patrolling party opened the bag and it smelt like narcotic substance, i.e. bhang-ganja. PI, V.N. Rajput, called two panchas and in presence of the panchas, the rexin bag which was carried by respondent No.1 was opened. From the bag, narcotic substance, bhang-ganja, was found which weighed 5 kg 500 grams. Out of the said quantity of ganja, 300 gram was taken as sample which was put in one plastic bag, and closed with the seal of PI, Patan City Police Station, by affixing a slip containing signatures of panchas. The remaining quantity of ganja was seized in presence of the panchas and same seal was affixed on it. A detailed panchanama was drawn in presence of panchas and contraband substance was seized. PSI, Nathani, lodged complaint against respondent No.1. Narcotic substance, complaint, panchanama and respondent No.1 were handed over to Patan City Police Station. Police Officer incharge of Patan City Police Station registered offence against respondent No.1 at C.R. No.II/206/91 under Section 20(B) of the NDPS Act. Investigation of the crime was handed over to PSI, Nathani. PSI, Nathani, sent the contraband substance for analysis to Forensic Science Laboratory through police constable, Babulal Ambalal Barot. PSI, Nathani, recorded statements of the members of the raiding party who were present during search and seizure of respondent No.1. While respondent No.1 was on remand, respondent No.1 disclosed that contraband substance belonged to respondent No.2, Shivaram Dhiraji Marwadi. He further disclosed that he was acting as a carrier of said Shivaram Dhiraji. PSI, Nathani, thereafter, added name of respondent No.2 in the above crime register. After receiving the report from the FSL, PSI, Nathani, filed chargesheet against the respondents for the offences stated above in the Court of learned Judicial Magistrate

(First Class), at Patan, which came to be registered as Criminal Case No.5419 of 1991. As offences under the NDPS Act are exclusively triable by the Court of Sessions, the learned Judicial Magistrate committed case to the Court of Sessions, Mehsana, which came to be numbered as Sessions Case No.31 of 1992. Charge Exh.2 was framed against the respondents under Section 20B and 29 of the NDPS Act. The charge was read over and explained to the respondents. The respondents did not plead guilty to the charge and claimed to be tried. To prove the charge against the respondents, the prosecution examined (I) PW 1, Narendrasinh Rajendrasinh Chavda, Exh.14, (II) PW 2 Kanuji Amarsinh Thakore, Exh.15, (III) PW 3 Ramchandra Dharamdas Exh.19, (IV) PW 4, Gordhandas Gopaldas Thakker, Exh.20, (V), PW 5, Virendrasinh M. Rajput Exh.21, (VI) PW 6, Harikrushna Tulsiram Patil, Exh.25, (VII) PW 7, Ukkamsinh Harisinh Yadav, Exh.26, (VII) PW 8, Babulal Ambalal Barot, Exh.28, and (IX), PW 9, Bhaturbhai Shamjibhai Nathani Exh.30. The prosecution produced documentary evidence such as report of FSL, panchanama of search and seizure of respondent No.1, complaint lodged by PSI, Nathani, forwarding letter sent to FSL, etc. to prove the charge against the respondents. After recording of evidence of prosecution witnesses was over, further statements of the respondents were recorded under Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the respondents stated that false case has been filed against them and no narcotic substance was seized from the possession of respondent No.1.

3. On appreciation of oral as well as documentary evidence led by the prosecution, and after hearing the arguments of learned advocates for the parties, the learned Additional Sessions Judge concluded that the prosecution had not proved that narcotic substance was found from the possession of respondent No.1. The learned Additional Sessions Judge further observed that the prosecution had failed to prove that respondent No.2 had abated or was a party to criminal conspiracy to commit offence of possessing narcotic substance with respondent No.1. The learned Additional Sessions Judge further concluded that evidence of the raiding party suffered from basic infirmities and it created doubt about presence of Police Inspector at the time of search and seizure of respondent No.1. In view of the abovereferred to conclusions, the learned Additional Sessions Judge acquitted the respondents by the impugned judgment, giving rise to the present appeal by the State of Gujarat

4. Mr. K.G. Sheth, learned Additional Public Prosecutor, has taken us through the evidence of the prosecution. The learned APP submitted that the conclusions drawn by the learned Additional Sessions Judge are against the evidence of the prosecution witnesses who had clearly proved that narcotic substance was found from the possession of respondent No.1. It is submitted that respondent No.2 had abated respondent No.1 in committing offence under the NDPS Act. Learned APP further submitted that the learned Additional Sessions Judge has erred in not relying upon the evidence of police personnel who were present at the time of search and seizure of respondent No.1, in which, narcotic substance weighing 5 kg 500 grams of ganja was found from a bag which was carried by respondent No.1. Learned APP for the appellant therefore submitted that there is ample evidence produced on record on the basis of which the learned Additional Sessions Judge ought to have convicted the respondents for the offences with which they were charged.

5. In our view, there is no substance in any of the contentions urged on behalf of the appellant. We have carefully gone through the evidence of prosecution witnesses, mainly of police personnel. The evidence of PI, Virendrasinh Rajput, had raised doubt whether he was present when search and seizure of respondent No.1 was carried out at S.T. Bus-stand, Patan. Description of bag which was carried by respondent No.1 did not tally with the description as mentioned in the panchanama. The learned Additional Sessions Judge had also observed in the judgment that muddamal bag which was produced in the Court was having a lock. The learned Additional Sessions Judge had also observed that it was difficult to believe how the said lock was opened for taking out the contraband substance from the bag. The observations of the learned Additional Sessions Judge are, in our opinion, eminently just and proper.

6. The contraband substance was seized from the possession of respondent No.1 on October 5, 1991 and, as per the evidence of PSI, Nathani, the same was handed over to the police station on the same day. In the panchanama of search and seizure, it is mentioned that out of quantity of 5 kgs 500 grams, 300 grams of ganja was taken as sample for sending it to FSL. It is mentioned in the panchanama that the said quantity of 300 grams was filled in a plastic bag and, after affixing a slip containing signatures of panchas, a seal bearing the impression of Police Inspector, Patan City Police Station, was affixed. When muddamal sample was received

at the FSL, it was found that the said muddamal sample was tied in one white cloth. We fail to understand how muddamal sample was covered by white cloth when it was lying at the police station. In our opinion, the muddamal, which was received by the FSL, was not of the same description which was seized at the time of drawing of panchanama. It is to be judged in the circumstance that after seizure of muddamal on October 5, 1991, the same was handed over to the police station immediately, and, as per the report of the FSL Exh.10, said muddamal was received by FSL on October 23, 1991, i.e. after 18 days. The delay in sending muddamal assumes importance. Learned counsel for the respondents has placed reliance on the decision of this Court (Coram: K.G. Shah & K.R. Vyas, JJ.) in Criminal Appeal No.50 of 1988, decided on January 22, 1992. In the above appeal, there was delay of 25 days in sending muddamal to the FSL. The Division Bench observed as under:

"In view of this delay it was obligatory for the prosecution to have led proper evidence to dispel all doubts about the possibility of the packet being tampered with during this period of 25 days. That is just not done in this case. Merely because Tersinh has prepared the forwarding letter on 9.5.1986 there is no warrant for saying that he had despatched the muddamal packet for being sent to the laboratory on the same day, i.e. on 9.5.1986. That the packet reached the laboratory on 3.6.1986 is a fact which appears from the laboratory report upon which the prosecution relies. We have no evidence on record as to where did this packet remain between 9.5.1986 and 2.6.1986. In what condition it was preserved is also not disclosed by the prosecution by leading proper evidence. In whose custody it remained during this interregnum is also not shown. What precautions were taken by the Custodian of this packet during this interregnum for proper preservation and for avoiding any possibility of tampering is also not brought forth."

In the present case, the prosecution had led no evidence as to how the muddamal was preserved at the police station and whether there was any chance of it being tampered. As description of muddamal as mentioned in the panchanama and as mentioned in the report of the FSL did not tally, in our opinion, there was chance that the muddamal was tampered with at the police station. As the identity of the muddamal becomes doubtful, in our opinion, the benefit of doubt should be extended in favour of the respondents.

7. The evidence of police personnel who were present at the time of carrying out search and seizure of

respondent No.1 also suffers from basic infirmities and there are many contradictions in their evidence. Under the circumstances, it cannot be said that any error is committed by the learned Additional Sessions Judge in acquitting the respondents of the offences with which they were charged.

8. This is an acquittal appeal in which the court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to interfere with the order of acquittal more particularly when the evidence has not inspired confidence of the learned Additional Sessions Judge who had an advantage of observing demeanour of witness. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Additional Sessions Judge for acquitting the respondents. Suffice it to say that the learned Additional Sessions Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Additional Sessions Judge in order to convince us to take the view contrary to the one already taken by the learned Judge. Therefore, the acquittal appeal deserves to be rejected.

9. For the foregoing reasons, we do not find any substance in the appeal. The appeal, therefore, fails and is dismissed.

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(swamy)